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Attorneys for Defendants  
CITY OF SANTA ROSA; RICH CELLI, an individual and  
Officer of the SANTA ROSA POLICE DEPARTMENT; TRAVIS MENKE,  
an individual and Officer of the SANTA ROSA POLICE DEPARTMENT ;  
PATRICIA MANN, an individual and officer of the  
SANTA ROSA POLICE DEPARTMENT; and JERRY SOARES,  
an individual and Office of the SANTA ROSA POLICE DEPARTMENT

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA DESANTIS, individually and as  
Success in Interest for RICHARD  
DESANTIS, deceased, and as Guardian ad  
Litem for DANI DESANTIS, a minor, and  
TIMOTHY FARRELL, a minor,

Plaintiffs,

v.

CITY OF SANTA ROSA, JERRY  
SOARES, RICH CELLI, TRAVIS MENKE,  
PATRICIA MANN and DOES 1 through  
25, inclusive,

Defendants.

Case No. C 07-3386 JSW

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE SECTION 12 (b)(6).**

**JURY TRIAL DEMANDED**

Date: October 12, 2007  
Time: 9:00 a.m.  
Ctroom: 2, 17<sup>th</sup> Floor

Defendants City of Santa Rosa, Santa Rosa Police Officers Jerry Soares, Rich Celli,  
Travis Menke and Patricia Mann jointly and severally submit the following memorandum of  
points and authorities in support of their motion to dismiss the complaint on file herein.

**I.**

**STATEMENT OF FACTS**

On April 8, 2007, Plaintiff Patricia DeSantis called 911 and reported that her husband,  
Richard DeSantis, had fired shots into the ceiling with a gun. She advised the dispatcher that

1 she was in the house with two minor children.

2 Several Santa Rosa Police officers were dispatched to the scene including the individually  
3 named officer defendants. The officers ordered Mr. DeSantis to come out of the house and then  
4 ordered him to lie down on the ground. Mr. DeSantis did eventually start to get down on the  
5 ground after the officers gave him repeated commands but then got up and began to charge  
6 towards the officers. At that point, Defendant Soares fired a non-lethal projectile. Officers Celli,  
7 Menke and Mann fired their weapons. Mr. DeSantis died as a result of two of the gunshot  
8 wounds.

9 This action is brought by his wife Patricia DeSantis on her own behalf and on behalf of  
10 her two minor children Dani DeSantis and Timothy Farrell. The complaint alleges a variety of  
11 causes of action under 42 USC §1983 which appear to be asserted on behalf of all three  
12 plaintiffs.<sup>1</sup> The complaint alleges that Patricia and Richard DeSantis were married on December  
13 19, 1998 and that she is the “successor in interest” to Richard DeSantis (paragraph 3). No  
14 affidavit is attached to the complaint to establish this status as required under California Code of  
15 Civil Procedure Section 377.32. The complaint further alleges that Timothy Farrell was born on  
16 March 3, 1997 and that he is the “defacto adopted son” of the decedent Richard DeSantis  
17 (paragraph 5). There is no allegation that he is the heir of Mr. DeSantis.

18 A certified copy of Timothy Farrell’s birth certificate which the court is requested to take  
19 judicial notice of is attached as Exhibit A to the Declaration of Caroline L. Fowler. The birth  
20 certificate lists the father as unknown.

21 As discussed below, only the personal representative of the decedent or his “successor in  
22 interest” are allowed to pursue a cause of action based upon the alleged constitutional violations  
23 that accrued prior to the decedent’s death. The complaint fails to comply with the procedural  
24 requirements to establish that Patricia DeSantis or the other plaintiffs have standing to assert the  
25 First, Second, Third and Fourth Causes of Action.

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26  
27 <sup>1</sup> The First Cause of Action is for excessive force against the individual officers; the Second Cause of  
28 Action is a Monnell Claim against the City based on Excessive Force; The Third Cause of Action is for Deliberate  
indifference to Medical Care against the Individual Officers; the Fourth Cause of Action is a Monnell claim against  
the City based upon the alleged deliberate indifference to providing medical care and the Fifth Cause of Action is for  
loss of familial relationship.

Further, Plaintiff Timothy Farrell lacks standing to assert any of the causes of action asserted herein since he is not the natural or adopted child of the decedent and is not an heir of the decedent.

## II.

### LEGAL ANALYSIS

#### A. STANDARD FOR RULE 12(B)(6) MOTION

A Motion to Dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *Rutman Wine Company v. E.&J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Levine v. Diamantheset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991). A motion under rule 12(b)(6) can be based upon the failure to allege a cognizable legal theory or on the failure to allege sufficient facts under a cognizable legal theory. *Roberson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34. Material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Nevertheless, the Court need not accept as true, allegations that contradict facts which may be judicially noticed by the Court. *Mullis v. U.S. Bankruptcy Court, Dist. of Nevada*, 828 F.2d 1385, 1388 (9th Cir. 1987); see also, *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Moreover, the Court need not accept as true, conclusionary allegations, unreasonable inferences, or unwarranted deductions of fact. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994); see also, *Transphase Systems, Inc. v. Southern California Edison Company*, 839 F.Supp. 711, 718 (C.D. Cal. 1993). The court is not required to assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Illeto v. Glock*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

The court may also consider in ruling on a motion to dismiss documents which are the subject of judicial notice. *Gallo v. Board of Regents of the University of California*, 916 F. Supp. 1005 (S.D. Cal. 1995); *Wilson v. United Airlines*, 1998 U.S. Dist. LEXIS 16976.

1 Where amendment of the complaint would be futile, the court may dismiss a cause of  
2 action with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9<sup>th</sup> Cir. 1996).

3 **B. THE ISSUE OF STANDING MAY BE RAISED BY A MOTION TO DISMISS**  
4 **UNDER RULE 12(b)(6).**

5 It is appropriate to address the question of standing in ruling on a motion to dismiss  
6 because the elements of standing are an indispensable part of the plaintiff's case and must be  
7 supported at each stage of the litigation in the same manner as any other essential element of the  
8 case. If the plaintiff lacks standing, the court does not have subject matter jurisdiction and  
9 dismissal is appropriate. *Warren v. Fox Worldwide, Inc.*, 328 F.3d 1136, 1140 (9<sup>th</sup> Cir. 2003);  
10 *Central Delta Water Agency v. United States*, 306 F.3d 938 (9<sup>th</sup> Cir. 2002)

11 To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts in his  
12 complaint which if proven would confer standing upon him. *Sacks v. Office of Foreign Assets*  
13 *Control*, 466 F.3d 764 (9<sup>th</sup> Cir. 2006). Standing challenges should be resolved prior to the merits  
14 of the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 140 L.Ed. 2d 210, 118 S.Ct.  
15 1003.

16 **C. PLAINTIFFS LACK STANDING TO BRING AN ACTION UNDER 42 U.S.C.**  
17 **§1983 BASED UPON THE CONSTITUTIONAL RIGHTS OF THE DECEDENT**

18 The survivors of an individual who is killed as a result of an alleged use of excessive  
19 force may assert a Fourth Amendment Claim on the individual's behalf if the relevant state law  
20 authorizes a survival action. *Moreland v. Las Vegas Metro Police Dept.*, 159 F.3d 365, 369 (9<sup>th</sup>  
21 Cir. 1998); *Foster v. City of Fresno*, 392 F.Supp.1140 (E.D. Cal. 2005).

22 The party seeking to bring a survival action bears the burden of demonstrating that a  
23 particular state's law authorizes a survival action and that the plaintiff meets that state's  
24 requirements for bringing a survival action. *Byrd v. Guess*, 137 F.3d 1126, 1131 (9<sup>th</sup> Cir. 1998).

25 California Code of Civil Procedure Section 377.32 provides that a person who seeks to  
26 commence an action as the decedent's successor in interest shall execute and file and affidavit  
27 under penalty of perjury that sets forth the facts required under that section which establish the  
28 person's standing as the personal representative or successor in interest. No affidavit is attached

1 by any of the plaintiff's in this action. The only plaintiff to allege standing as the "successor in  
2 interest" of the decedent is Patricia DeSantis. There are no specific facts alleged to support this  
3 conclusionary allegation.

4 The requirements of California Code of Civil Procedure Section 377.32 have been held  
5 to apply to an action in Federal Court brought under 42 U.S.C §1983. *Tatum v. City and County*  
6 *of San Francisco*, 441 F.3d 1090 (9<sup>th</sup> Cir. 2006); *Robbins v. City of Hanford*, 2006 U.S. Dist  
7 LEXIS 44173; *Stephens v. Stanislaus County Sheriff*, 2007 U.S. Dist LEXIS 27366.

8 Here, the only plaintiff who alleges to be a successor in interest to the decedent is Patricia  
9 DeSantis. Thus, there are no allegations that allege any facts to establish that the two minor  
10 children have standing with respect to First through Fourth Causes of Action. With respect to  
11 Patricia DeSantis it is insufficient to merely allege that she is the successor in interest without  
12 complying with the requirements of Code of Civil Procedure Section 377.32. *Tatum v. City and*  
13 *County of San Francisco* 441 F.3d 1090 (9<sup>th</sup> Cir. 2006); *Robbins v. City of Hanford*, 2006 U.S.  
14 Dist LEXIS 44173; *Stephens v. Stanislaus County Sheriff*, 2007 U.S. Dist LEXIS 27366. It is  
15 unknown at this time whether the decedent died intestate or whether there is or will be a probate  
16 estate.

17 **D. PLAINTIFF TIMOTHY FARRELL LACKS STANDING TO ASSERT A CAUSE**  
18 **OF ACTION UNDER 42 U.S.C. § 1983 FOR LOSS OF FAMILIAL**  
**RELATIONSHIP**

19 The Fifth Cause of Action asserts a cause of action on behalf of all three plaintiffs for loss  
20 of familial relationship under the Fourteenth Amendment.

21 The complaint alleges that Plaintiff Timothy Farrell is the "defacto adopted son" of the  
22 decedent. The complaint further alleges that he was born on March 3, 1997 (complaint  
23 paragraph 5) which is prior to the marriage of Patricia and Richard DeSantis on December 18,  
24 1998 (See complaint paragraph 3).

25 Attached as Exhibit A to the Declaration of Caroline L. Fowler is a true and correct copy  
26 of the certified birth certificate of Timothy Farrell which the court is requested to take judicial  
27 notice of. The birth certificate lists his father as unknown.

28 Accordingly, in addition to lacking any standing to assert the First through Fourth Causes

1 of Action, plaintiff Timothy Farrell also lacks standing to assert a cause of action under the Fifth  
2 Cause of Action. The complaint should therefore be dismissed in its entirety against Plaintiff  
3 Timothy Farrell.

4 **III.**

5 **CONCLUSION**

6 For the foregoing reasons, defendants respectfully request that the court dismiss the entire  
7 complaint against Plaintiff Timothy Farrell and that the First through Fourth Causes of Action be  
8 dismissed against Plaintiffs Patricia DeSantis and Dani DeSantis.

9  
10 Dated: August \_\_, 2007

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11 Caroline L. Fowler  
12 Assistant City Attorney  
13 Attorney for Defendants  
14 City of Santa Rosa, Santa Rosa Police Officers  
15 Jerry Soares, Rich Celli, Travis Menke, and Patricia Mann  
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